

1 Michael I. Neil (SBN 40057)
Hugh A. McCabe (SBN 131828)
2 NEIL, DYMOTT, FRANK, MCFALL
& TREXLER APLC
3 1010 Second Avenue, Suite 2500
San Diego, California 92101
4 Telephone: (619) 238-2240
Facsimile: (619) 238-1562

5 Gregory S. Arovas (*pro hac vice*)
6 Todd M. Friedman (*pro hac vice*)
KIRKLAND & ELLIS LLP
7 601 Lexington Avenue
New York, NY 10022-4675
8 Telephone: (212) 446-4800
Facsimile: (212) 446-6460

9 Attorneys for Plaintiff
10 ContentGuard Holdings, Inc.

N. Thane Bauz, Esq.
PERKINS COIE
11988 El Camino Real, Suite 200
San Diego, CA 92130-3579
Telephone: (858) 720-5706
Facsimile: (858) 720-5799

Jay H. Reiziss (*pro hac vice*)
Jon H. Beaupré (*pro hac vice*)
Jeremy S. Snodgrass (*pro hac vice*)
Brinks Hofer Gilson & Lione
NBC Tower, Suite 3600
455 North Cityfront Plaza Drive
Chicago, IL 60611-5599
Phone: 312-321-4200
Fax: 312-321-4299

Attorneys for Defendants
ZTE Corporation and ZTE (USA) Inc.

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13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**
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16 ContentGuard Holdings, Inc.,

17 *Plaintiff,*

18 v.

19 ZTE Corporation and ZTE (USA) Inc.,

20 *Defendants.*
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Case No. 3:12-cv-01226-CAB-MDD

DEMAND FOR JURY TRIAL

**JOINT MOTION FOR
DETERMINATION OF
DISCOVERY DISPUTE**

Hon. Mitchell D. Dembin
Suite 1180, 11th Floor Annex

1 Plaintiff ContentGuard Holdings, Inc. and defendants ZTE Corporation and ZTE (USA) Inc.
2 (collectively "ZTE") respectfully submit this Joint Motion for Determination of Discovery Dispute.¹

3 ContentGuard and ZTE dispute whether they are yet required to hold the discovery planning
4 conference set forth in Federal Rule of Civil Procedure 26(f) at this time. The parties respectfully
5 request that the Court resolve their dispute.

6 In accordance with the Court's Civil Pretrial Procedure V.C, the parties state the following:

7 1. On December 13, 2012, ContentGuard wrote to ZTE and requested that the parties hold a
8 Rule 26(f) conference as soon as possible. In support, ContentGuard explained that Rule 26(f)
9 requires the parties to confer "as soon as practicable," and that a prompt conference was appropriate
10 under both the Civil and Patent Local Rules. ContentGuard also explained its belief that the parties
11 could hold a meaningful and productive Rule 26(f) conference now, despite ZTE's pending motion
12 to dismiss ContentGuard's claims for indirect patent infringement, because ZTE's motion neither
13 addresses ContentGuard's claims for direct patent infringement nor affects which parties are in this
14 case, which patents are in suit, or which products are accused of infringement. ContentGuard
15 repeated its request on December 18.

16 2. ZTE responded to ContentGuard's requests on December 18, and stated that a Rule 26(f)
17 conference would be premature at this time. ZTE explained its view that, because its pending motion
18 could impact the scope of discovery, no efficiency would be gained by holding a Rule 26(f)
19 conference while the motion remained pending. ZTE also stated that a Rule 26(f) conference would
20 be premature because the Court has not yet scheduled an ENE, and Patent Local Rule 2.1(a) states
21 that "[n]o later than twenty-one (21) days before the ENE, the parties will meet and confer pursuant
22 to Fed. R. Civ. P. 26(f)."

23 3. ContentGuard continues to believe that ZTE is required to participate in a Rule 26(f)
24 conference at this time. Rule 26(f) explicitly requires the parties to confer "as soon as practicable,"
25 and the Advisory Committee Notes explain that ZTE's pending motion does not suspend that

26 ¹ ZTE participates in the present joint motion in lieu of an *ex parte* brief by ContentGuard on the
27 issue, but it is ZTE's position that the present motion is unnecessary and improper, as is set forth
28 in more detail in the accompanying memorandum.

1 obligation. In this case—which has been pending for ten-and-a-half months—it has long been
2 practicable for the parties to confer. Although ZTE's motion to dismiss remains pending, that motion
3 is limited to ContentGuard's claims for indirect infringement. Accordingly, discovery will
4 necessarily proceed with respect to ContentGuard's claims for direct infringement, all six patents-in-
5 suit, and all of the products accused of infringing them, regardless of the outcome of ZTE's motion.
6 The parties can therefore meaningfully discuss how to proceed with discovery of all of those topics
7 now, with no risk that a ruling on ZTE's motion will render their efforts wasteful. And although
8 Patent Local Rule 2.1(a) ties the last date on which the parties may hold a timely Rule 26(f)
9 conference to the ENE, it does not alter Rule 26(f)'s requirement that "the parties must confer"
10 earlier if it is "practicable" to do so. Finally, because ZTE's motion is limited to indirect
11 infringement, there is no good cause to stay ContentGuard's claims for direct infringement—the
12 inefficient result of ZTE's refusal to confer.

13 4. ZTE maintains its position that a Rule 26(f) conference is premature at this time because
14 the parties do not yet know what claims are pending in the case. It is impracticable to proceed with
15 discovery on direct infringement while waiting for discovery on indirect infringement, as
16 ContentGuard suggests the parties should do. Direct infringement and indirect infringement include
17 interwoven factual issues that cannot be easily bifurcated. Additionally, the local rules, federal rules,
18 and applicable case law from this Court and other courts all support ZTE's position. ZTE is willing
19 to participate in a Rule 26(f) conference at a time that is practicable and efficient for the parties and
20 the Court, namely, after ZTE files its Answer and the Court schedules an ENE.
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1 Dated: January 14, 2013

2 Respectfully submitted,
 3 By: /s/ Hugh A. McCabe
 4 Hugh A. McCabe (SBN 131828)
 5 NEIL, DYMOTT, FRANK, MCFALL &
 6 TREXLER APLC
 7 1010 Second Avenue, Suite 2500
 8 San Diego, California 92101
 9 Telephone: (619) 238-2240
 10 Facsimile: (619) 238-1562

11 Gregory S. Arovas (*pro hac vice*)
 12 greg.arovas@kirkland.com
 13 Todd M. Friedman (*pro hac vice*)
 14 todd.friedman@kirkland.com
 15 KIRKLAND & ELLIS LLP
 16 601 Lexington Avenue
 17 New York, NY 10022-4675
 18 Telephone: (212) 446-4800
 19 Facsimile: (212) 446-6460

20 **ATTORNEYS FOR PLAINTIFF**
 21 **CONTENTGUARD HOLDINGS, INC.**

22 Dated: January 14, 2013

23 Respectfully submitted,
 24 By: /s/ N. Thane Bauz
 25 N. Thane Bauz
 26 TBauz@perkinscoie.com
 27 PERKINS COIE
 28 11988 El Camino Real, Suite 200
 San Diego, CA 92130-3579
 Telephone: (858) 720-5706
 Facsimile: (858) 720-5799

Jay H. Reiziss
 jreiziss@brinkshofer.com
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 jsnodgrass@brinkshofer.com
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 455 North Cityfront Plaza Drive
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